No. 84-701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

RIVERSIDE BAYVIEW HOMES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL CATTLEMEN'S ASSOCIATION, AND RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether federal jurisdiction under the Clean Water Act to regulate discharges into "navigable waters" extends to areas which are occasionally inundated or saturated from sources having no hydrologic connection to any lake, stream, river, or tributary.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation, the National Cattlemen's Association, and the Resource Development Council for Alaska, Inc., respectfully submit this brief amicus curiae in support of the respondents, Riverside Bayview Homes, Inc., et al. Consent to the filing of this brief has been obtained from counsel for all parties and copies of these consent letters have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt, public interest organization with over 19,000 contributors and supporters located throughout the country and with offices in Sacramento, California, and Wash-

ington, D.C., and liaison offices in Seattle, Washington, and Anchorage, Alaksa.

Since its establishment in 1973, PLF has actively engaged in research and litigation over a broad spectrum of public interest issues. PLF advocates a balanced approach in dealing with public interest issues, and supports the concept that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved. PLF has especially stressed this approach in the area of land use regulation and also where environmental issues are concerned.

The Resource Development Council for Alaska, Inc. (RDC), and the National Cattlemen's Association represent private property owners throughout the United States. While the specific activities and objectives of each of these organizations are unique, both share a concern about the regulation of waters and wetlands under Section 404 of the Clean Water Act (CWA). 33 U.S.C. § 1344.

RDC is a statewide citizens' group, based in Anchorage, Alaska, with a membership of approximately 10,000 individuals, labor unions, businesses, regional native corporations, municipalities, chambers of commerce, and trade associations. The objective of RDC is to assist in the creation of a broad-based economy in Alaska, with long-term stable employment, orderly growth, and improved living standards for Alaskans. RDC is particularly interested in helping to assure the rational development of Alaska's vast natural resources, which are of vital importance to the nation's energy, mineral, forest products, and food production needs.

The National Cattlemen's Association (NCA) is a nonprofit trade organization representing over 245,000 professional cattlemen throughout the United States. NCA's headquarters is located in Denver, Colorado. The purpose of NCA is to provide an organization through which

all segments of the beef cattle industry, including cattle breeders, producers, and feeders, may work toward solutions of industry problems and may inform the public about issues related to the industry.

SUMMARY OF THE ARGUMENT

The Sixth Circuit's interpretation of the Army Corps of Engineers' (Corps) Section 404 wetlands definition provides necessary relief for private property owners who have often been unjustifiably subjected to the rigors of the Section 404 process due to the vague and overly broad nature of the Corps' jurisdictional terms. The ruling by the Sixth Circuit establishes a palpably sensible and legally supportable test for making jurisdictional determinations under Section 404 which will reduce considerably the regulatory burdens presently imposed on property owners.

The Sixth Circuit's decision is entirely consistent with the goals and objectives of the CWA in that it maintains environmental protection over traditionally navigable waters and their tributaries as was originally intended by Congress in the 1972 Federal Water Pollution Control Act (FWPCA). In addition, to the extent Congress sought to protect wetlands under its 1977 amendments to FWPCA, the lower court's jurisdictional test also encompasses those swamps, marshes, and bogs which are hydrologically connected and, therefore, possibly environmentally critical to navigable waters and their tributaries.

INTRODUCTION

Section 404 of the CWA was enacted by Congress in 1972 as part of the amendments to the FWPCA. (FWPCA was renamed the CWA under the 1977 amendments.) Pursuant to this Section, the Corps is authorized to regulate the discharge of dredged or fill material into the navigable waters of the United States. It can safely be contended that there are few, if any, federal environ-

mental programs that have had a more compelling and pervasive impact on private property rights in this country than Section 404. The conflict which has evolved between the constitutional rights of property owners to the reasonable use of their land and the desire to protect and preserve our aquatic environment has quite often been fought within the Section 404 arena. As a result, numerous property owners, who have been denied discharge permits under Section 404, have been forced to bear the cost of environmental preservation through the loss of valuable property rights—a cost which in all fairness and equity should be borne by the benefited society.

While the economic impacts associated with Section 404 are indeed of great concern to many, the most critical issue regarding Section 404 lies in the uncertainty over the Corps' regulatory jurisdiction under the CWA. The lack of any specific clarification regarding the term "navigable waters" in the CWA has resulted in much confusion and controversy over the jurisdictional scope of Section 404. Initially, the Corps viewed its jurisdiction as being coterminous with that under the Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. §§ 401, *et seq.* Pursuant to the RHA, the Corps prescribed its jurisdiction on the basis of the traditional or historical definition of "navigable waters"—*i.e.*, those waters that "are subject to the ebb and flow of the tide, and/or are presently or have been in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (1984). The Corps' attempt to define its jurisdiction in this manner did not, however, survive judicial scrutiny. In 1975, the United States District Court for the District of Columbia held that Congress intended for the Corps to assert federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. The term "navigable water" for purposes of the FWPCA was not, therefore, limited to the RHA's traditional test of navigability. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

Subsequent to the decision in *Callaway*, the Corps amended its definition of "navigable waters" to include, among other aquatic areas, "wetlands." Proponents of this expanded jurisdiction contend that it is fully consistent with the goals of the CWA and with the intent of Congress. Opponents of such expansive regulatory jurisdiction, however, argue that the CWA was designed to *protect water quality, not to preserve wetland areas.*

The absence of any direct congressional action on the issue of jurisdiction, coupled with the administrative mismanagement of the Section 404 program, has resulted in the imposition of unjustifiable burdens on individual property owners such as Mr. George Short, the owner of Riverside Bayview Homes. While academicians, lawyers, and legislators debate over the permissible bounds of the Corps' jurisdictional authority under Section 404, private property owners like Mr. Short are being continually subjected to an administrative process which has oftimes resulted in a complete deprivation of private property rights. The need to recognize and to respect such rights was in fact underscored by the Sixth Circuit in the case at bar. The Court of Appeals specifically noted that the "exercise of apparently unbounded jurisdiction by the Corps" over waters within the United States raises a serious taking problem under the Fifth Amendment to the Constitution. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 398 (6th Cir. 1984), Appendix to Petition for Certiorari (Pet. App.) at 15a.

This case brings before this Court many of the more perplexing problems which have beset Section 404 since its inception. At the very least, this case will decide whether Mr. Short's property falls within the Corps' current wetlands definition, and will thereby hopefully enable him to terminate ten years of legal and adminis-

trative battles in the vindication of his property rights. On a much larger scale, however, this case will also decide to what extent the Corps may exercise regulatory jurisdiction over the nation's waters under the CWA.

ARGUMENT

I. THE SIXTH CIRCUIT WAS CORRECT IN HOLDING THAT THE RIVERSIDE PROPERTY DOES NOT CONSTITUTE A WETLAND SUBJECT TO THE ARMY CORPS' JURISDICTION

The Sixth Circuit's determination that Mr. Short's property does not constitute a wetland was based, in part, on its perception, which amici fully support, that Congress could not have intended for the CWA "to cover a piece of property [Riverside] a mile inland from Lake St. Clair which has been farmed in the past and is now platted and laid out for subdivision development with the fire hydrants and storm sewers already installed." *Riverside Bayview*, 729 F.2d at 398, Pet. App. at 13a-14a. The court determined that the Corps' wetland regulation requires a hydrologic connection between the property alleged to be a wetland and a navigable water as defined in the CWA. *Id.*

As will be shown below, the Court of Appeals' interpretation of the wetlands regulation is entirely consistent with the objectives and goals articulated in the CWA and with congressional intent underlying the Act. It also provides a more reasonable and equitable method for asserting jurisdictional claims under Section 404 and protects private property owners from excessive and unwarranted federal regulation of their land.

A. The Jurisdictional Terms Related To Implementation of Section 404 Have Led To Unreasonable and Unjustified Impacts on Private Property Owners

Since its inception in 1972, Section 404 of the CWA has been plagued with uncertainties related to its intended scope. Private property owners planning activities in the vicinity of waters of the United States, as well as in areas totally unrelated to such waters, have frequently been uncertain as to whether a Section 404 permit was required and have often been required to obtain permits or modify projects *after* they have begun or have even been completed. Much of this confusion on the part of landowners stems from the fact that Section 404, which was clearly intended by Congress to be a means for protecting the quality of our nation's waters, has inexplicably evolved into a national wetlands protection statute.

In order to fully understand and appreciate the irrationality of the current jurisdictional scope of Section 404, one need only look at several representative case examples of uncertainty and delay related to the ambiguity of the jurisdictional terms. The case of Madrona Marsh in Torrance, California, is a case in point.

In February, 1980, the Corps asserted Section 404 jurisdiction over an area known as Madrona March. Portions of this land area are subject to inundation during and immediately following the rainy season. The waters which accumulate in the area do not arrive through any waterways, nor do they ultimately end up in any public body of water such as a river, stream, lake, reservoir, bay, gulf, sea, or ocean. At present, most of the water is supplied through two drainage ditches designed to transmit rainfall. According to Army Corps documents, the area has

> "no underground water source from springs . . . and is maintained as a wetland during the wet season due to an impermeable clay soil layer which prevents percolation, and to a lesser extent, transpiration. The surface water which collects during the wet season is not connected with the ground water table, and the marsh has no outlet. As such, it is an isolated [intermittent] wetland." Army Corps Determination of Jurisdiction Under Clean Water Act

—Madrona Marsh, Torrance, California, at 1-2 (issued by Homer Johnstone, Brigadier General, USA Division Engineer), Army Corps, Los Angeles District, Los Angeles, California (June 14, 1982).

A capsulization of the events that have occurred in this matter points out how the overly broad and imprecise definition of "waters of the United States" forces large and small property owners alike to proceed preliminarily through a cumbersome, costly, and seemingly endless administrative proceeding just to determine whether CWA jurisdiction may, in fact, be appropriately asserted.

In 1981, a petition for withdrawal of jurisdiction over Madrona Marsh was submitted to the Corps, and after the matter had been transmitted through the Environmental Protection Agency (EPA), the Corps reversed its initial position and concluded that it had no jurisdiction over Madrona Marsh. This, unfortunately, was not the end of the case.

In March, 1982, the Chief of Engineers, at the request of a group known as the "Friends of Madrona Marsh," ordered a complete review of the Section 404 jurisdiction over Madrona Marsh and reopened the record for additional "public participation." *See* Public Notice, issued March 26, 1982, Department of the Army, Los Angeles District, Corps of Engineers, Los Angeles, California. Finally, in June, 1982, the Corps conclusively determined that it had no jurisdiction over the Madrona Marsh area. *See* Army Corps Determination of Jurisdiction, *supra* at 7. It took an incredible two years and four months of bureaucratic processing just to determine whether or not jurisdiction could be properly asserted over this site.

It must be borne in mind that the 28 months of administrative processing in the Madrona Marsh case were utilized *only* to determine if jurisdiction existed; once the jurisdictional issue is resolved, however, a property owner might then be required to wait an equally oppressive

length of time to receive a Section 404 permit.[1] Under the Sixth Circuit's decision below, an intermittent wet area such as Madrona Marsh would clearly fall beyond the regulatory jurisdiction of the Corps since no hydrological connection existed between the marsh and an adjacent lake, stream, or river. The exclusion of an area such as Madrona Marsh from the Corps' Section 404 program is clearly consistent with the goals of the Clean Water Act since the marsh in no way impacted upon the quality of our nation's navigable waters. Until the jurisdictional limits of the Corps' authority are firmly established, however, cases such as Madrona Marsh will continue to occur. The Madrona Marsh experience also serves to contradict the government's position that the current jurisdictional test "can be applied to particular parcels of land" with "relative ease." Petitioner's Brief (Pet. Brief) at 44. Surely, a 28-month entanglement with bureaucratic red tape does not signify a program that is applied with relative ease.

The Madrona Marsh scenario is only one example of the consequences of an imprecise statute and regulations governing the Section 404 program. While the property owner in this case could financially afford to pursue an administrative determination, there are thousands of small property owners subject to the Corps' regulations who cannot shoulder the burden. *See* example of Mr. Arnie Thomas, *infra* at 18.

These case studies are not simply aberrations from an otherwise easily administered and well-managed regulatory program. They are, instead, representative examples from a program drifting in a sea of limitless jurisdiction. Until the boundaries envisioned by Congress under the CWA are clearly ascertained and definitively marked, any attempt to chart a course for the program to sail by will invariably sink. The need to establish an "adequate limiting principle" regarding the Corps' jurisdiction was

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[1] *See* Case Summaries Nos. 1, 2, Appendix A at A-3, A-5.

specifically noted by the Sixth Circuit in its denial of the government's request for a rehearing *en banc*:

> "By an unusual construction of the words 'navigable waters' in the Clean Water Act, the government and . . . amicus curiae would apparently have the Court by injunction prevent the owner from using low lying land areas where water sometimes stands and where vegetation requiring moist conditions grows. Such low lying lands would be converted into navigable waters without regard to either their proximity to navigable waters, streams or seas or the inundation of such lands by such navigable waters. Under such a construction low lying backyards miles from a navigable waterway would become wetlands. Neither the government nor amicus suggests an adequate limiting principle. Such a construction is overbroad and inconsistent with the language of the Act in question, and the Court declines to adopt such a construction." *Riverside Bayview*, 729 F.2d at 401, Pet. App. at 20a-21a.

The numerous shortcomings of the Section 404 program, particularly its jurisdictional scope, were in fact revealed by the Presidential Task Force on Regulatory Relief in 1982. *See* Presidential Task Force on Regulatory Relief, Office of the Vice President, *Administrative Reforms to the Regulatory Program Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act* (Administrative Reforms) (May 7, 1982) (portions of this report are contained herein at Appendix A). This special Task Force, headed by Vice President Bush, specifically determined that the Section "404 program has been plagued by uncertainties over its jurisdictional scope [and that] [i]ndividuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required . . . ." *See* Appendix A at A-7.

Concern over Section 404's seemingly limitless jurisdiction has also been echoed by the agency charged with

administering the program, the Corps of Engineers. William Gianelli, former Assistant Secretary to the Army for Civil Works, had been committed to reducing the jurisdictional scope of the program, impelled in his effort by the view "that the Section 404 program ha[d] gone far beyond its originally envisioned scope and, more importantly, beyond the appropriate role of the federal government in regulating the development of private and public resources." [2] Mosher, *When Is a Prairie Pothole a Wetland? When the Federal Regulators Get Busy*, Nat'l Journal 410, 412 (March 6, 1982). Mr. Gianelli was sympathetic to " 'protecting the nation's valuable wetlands' " but he believed that " 'a far better method [for doing this] would be for the Congress to legislatively identify and designate the true wetlands needing protection from all development rather than to try and afford incomplete protection through the piecemeal, backdoor approach applicable to landfill areas under the Corps' 404 program.' " *Id.*

As illustrated by the case studies cited above, and substantiated by the Task Force report and Mr. Gianelli's comments, the confusion generated by the Corps' unbounded Section 404 jurisdiction has had a devastating impact on private property owners. This impact has resulted not only from the unwarranted inclusion of all wetlands within the scope of Section 404 but also from the various "presumptions" regarding wetland values that have been built into the Corps' regulatory program. These presumptions further compound the problems affecting property owners in this country. They therefore provide additional evidence as to why the scope of the Corps' jurisdiction should be circumscribed in the manner expressed by the Court of Appeals.

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[2] Although the Corps has previously taken some steps to reduce the regulatory burden of Section 404, these attempts were not directed toward limiting the scope of jurisdiction. *See* 49 Fed. Reg. 39,478 (1984) (to be codified at 33 C.F.R. Parts 320, 323, 330).

B. Not Only Have Wetlands Been Erroneously Embodied Within Section 404, But Invalid Presumptions Regarding Wetlands Have Also Been Incorporated Into the Corps' Regulatory Scheme

While the "ecological value" of wetlands is not directly at issue in this case, amici believe that it is important for this Court to understand not only that all wetlands have been erroneously included within Section 404, but also that these areas have been improperly accorded special protections under the Corps' regulations which severely reduce the likelihood that a permit will be granted once jurisdiction has been asserted. The nature of these presumptions and their impact on the Section 404 permit process substantially refute the government's position that "the mere assertion of regulatory jurisdiction does not . . . mean that a permit will be denied" and also its contention that the current wetlands regulation reflects good science. Pet. Brief at 11, 37.

In evaluating a Section 404 permit application, the Corps must adhere to guidelines developed by EPA. 33 C.F.R. § 323.6; 40 C.F.R. Part 230 (1984). Several of these guidelines essentially incorporate into the Section 404 permit process a wetlands preservation bias. For example, Section 230.1(d) of the guidelines provides:

> "From a national perspective, the degradation or destruction of special aquatic sites,[3] such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources."

[3] Special aquatic sites are defined as "geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values." 40 C.F.R. § 230.3 (q-1). According to the regulations, however, wetlands are *automatically* deemed to be special aquatic sites whether they possses these qualities or not. 40 C.F.R. Part 230, Subpart E.

Similarly, Section 230.1(c) of the guidelines states that "[f]undamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem" unless certain conditions are met. Thus, any wetland area which is determined to be within the overly expansive grasp of Section 404 is *presumed* to be vital to the public interest without regard to its actual value or lack of value to the aquatic ecosystem. Even the Corps' own regulations provide that the destruction or alteration of wetlands "should be discouraged as contrary to the public interest." 33 C.F.R. § 320.4(b).

Contrary to the views regarding wetlands that are prevalent in the current Section 404 regulations, the scientific community has recognized that not all wetlands are valuable to the aquatic ecosystem:

> "Just as all wetlands do not have all of the values prescribed to them . . . it must be emphasized that *all wetlands are not going to have all of the effects that are described.* The effect of a given wetland on water quality is very dependent on the hydrological characteristics of the area." Kibby, *Effects of Wetlands on Water Quality,* Strategies for Protection and Management of Floodplain Wetlands and Other Riparian Ecosystems at 289 (U.S. Dept. of Agriculture 1978) (emphasis added).

The regulatory dilemma which has resulted from the overrating of wetland values was aptly expressed by Dr. Joseph S. Larson in his article *A National Program for Regional Wetland Assessment,* 5 Nat'l Wetlands Newsletter 2 (Sept.-Oct. 1984):

> "Scientific evidence strongly suggests that every wetland does not perform every publicly-valued wetland function. Nonetheless, federal and state wetland protection policies continue to presume, in the absence of evidence to the contrary, that all functions are equally important in all wetlands. And under such policies, there is an apparent lack of linkage between the functional role of a wetland and the application of regulations."

The Corps' current wetlands definition, which the government contends reflects good science, precludes categorization and evaluation of wetlands according to their actual contribution to water quality. This is in fact contrary to scientific knowledge about wetlands. *See* Scientists Report, National Symposium on Wetlands at 14 (sponsored by the National Wetlands Technical Council) (Nov. 1978) ("[g]eographic, climatic, hydrologic and other factors greatly affect the character and functions of wetlands. As a result, the transference of characteristics (values) of one wetland . . . to another must be done cautiously . . . ."); Classification of Wetlands and Deepwater Habitats of the United States, Fish and Wildlife Service, Department of the Interior (1979). Consequently, there are many areas in this country which are being subjected to the Corps' regulatory program that have absolutely no connection to the goals of the CWA and which were never intended by Congress to be held captive in the federal regulatory system.

In addition to the absence of a scientific basis, there is also no statutory basis for the wetlands presumptions, which place a more stringent burden on property owners seeking to discharge in areas encompassed by Section 404 than the burden placed on applicants for permits under Section 403 or other sections of the CWA. Section 403 of the CWA regulates discharges into the "territorial sea, the waters of the contiguous zone, [and] the oceans." 33 U.S.C. § 1343(a). Although the CWA mandates that the Section 404(b)(1) guidelines be based on criteria established pursuant to Section 403 (33 U.S.C. § 1344 (b)), the guidelines in fact differ markedly from the Section 403 criteria.[4] No justification can be found in the statute for such discrimination.

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[4] For example, the ocean criteria for evaluating dredged material provide that when the dredged material is "substantially the same as the substrata at the proposed disposal site" and the site of the origin of the material is "far removed from known historical sources of pollution," no further testing for environmental impacts is required. *See* 40 C.F.R. §§ 227.13(b) and 227.13(b)(3)(ii). No such provision, however, exists in the Section 404(b)(1) guidelines, which are significantly more stringent than the Section 403 criteria.

The Section 404(b)(1) guidelines also provide that "where the activity associated with a discharge . . . does not require access or proximity to or siting" within a "special aquatic site,"[5] including any wetland, "practicable alternatives . . . are *presumed* to be available, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3) (emphasis added). This so-called "water dependency test"[6] similarly finds no support in the CWA, nor is there anything in the ocean discharge criteria which requires this additional test. The difficulties arising from the presumption that *practicable* land-based alternatives exist for a nonwater-dependent project are futher intensified by the extremely broad definition used in determining what is "practicable."[7]

Under the guidelines, the Corps makes the initial determination as to whether a proposed activity requires access to water to fulfill its basic purpose. *In the case of a proposed project on an isolated or intermittent wet area, such as Madrona Marsh, however, the permit applicant obviously could never demonstrate water dependency since the proposed project site is wholly unconnected to*

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[5] Defined *supra* at n.3.

[6] A project is considered nonwater-dependent if it does not require access or proximity to the special aquatic site in order to fulfill its basic purpose.

[7] "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered." 40 C.F.R. § 230.10(a)(2).

any other body of water. Consequently, a permit would never issue unless the applicant could overcome the presumption that practicable alternatives exist.

As is evident from the foreging discussion, the onerous nature of the presumptions regarding wetlands that are engrafted into the Corps' regulatory program substantially undercut the government's position regarding the effect of "the mere assertion of regulatory jurisdiction." Pet. Brief at 11. In the State of Alaska, for example, the exercise of jurisdiction over a particular area has quite often marked the beginning of the end for a permit applicant not only due to the foregoing presumptions but also because of the plethora of federal and state agencies that are afforded an opportunity to comment on a permit application.[8]

1. The Sixth Circuit's Narrow Interpretation of the Wetlands Regulation Is Clearly Warranted in View of the Significant Impacts on Property Rights That Result From the Application of the Section 404 Regulations

The substantial interference with private property rights that results from the "mere assertion" of Section 404 jurisdiction is precisely why the Sixth Circuit interpreted the Corps' jurisdiction narrowly. The court did so in order to avoid "a very real taking problem." *Riverside Bayview*, 729 F.2d at 398, Pet. App. at 15a. The concern voiced by the lower court was in fact recently

[8] A partial list of these agencies include the Environmental Protection Agency, Department of the Interior, Fish and Wildlife Service, National Marine Fisheries Service, Alaska Department of Fish and Game, Alaska Department of Environmental Conservation, and the Alaska Department of Natural Resources. "The inescapable result is a labyrinth from which an applicant may never emerge." Testimony of Robert Fleming before Senate Committee on Environment and Public Works Subcommittee on Environmental Pollution Concerning Implementation of Section 404 of the Federal Water Pollution Control Act in Alaska at 3 (June 23, 1980).

realized in *Florida Rock Industries, Inc. v. United States*, Civil Action No. 266-82L (Ct. Cl. May 6, 1985), where it was held that the denial of a Section 404 permit constituted a taking of the plaintiff's property since the land in question could "be put to no viable economic use without such a permit." *Id.* at 1. In the course of its opinion, the court cited with approval the following language from a state supreme court decision discussing the cost of wetlands preservation:

> "'[T]he area of Wetlands representing a "valuable natural resource of the State," of which appellants' holdings are but a minute part, is of state-wide concern. The benefits from its preservation . . . are state-wide. The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose.'" *Id.* at 21, *quoting State of Maine v. Johnson*, 265 A.2d 711, 716 (Me. 1971).

See also Armstrong v. United States, 364 U.S. 40, 49 (1960) ("[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

While the government, as well as the amici in support of it, is quite prolific in espousing the values and virtues of wetlands and in emphasizing the need to protect such areas, the government completely disregards the fact that it is individual property owners in this country who have been forced to bear the cost of this protection. As made clear by the court in *Florida Rock Industries*, however, "courts do not view the public's interest in environmental and aesthetic values as a servi-

tude upon all private property, but as a public benefit that is widely shared and therefore must be paid for by all." *Florida Rock Industries* at 21.

The case of Arnie Thomas, a homeowner in Appleton, Wisconsin,[9] ideally demonstrates that this burden is not being equally shared by all and illustrates the unreasonableness of the presumptions regarding wetlands and practicable alternatives contained in the Section 404 regulations. In 1981, Mr. Thomas extended his backyard an additional 8 feet to his property line by filling in a "swamp" area with 50 cubic yards of dirt. He then planted grass seed and started a vegetable garden on the filled-in land. The Corps asserted Section 404 jurisdiction over the property and ordered Mr. Thomas either to remove the dirt or apply for an "after-the-fact" Section 404 permit. Mr. Thomas decided to submit a permit application, which contained as one of its 55 questions what the effect of the project would be on navigation.

The "swamp" in Mr. Thomas' backyard, which the Corps sought to protect, was not connected to any other body of water. Although Mr. Thomas' neighbors supported his fill activity, saying the area was previously filled with rubbish and served as a breeding ground for rodents and mosquitoes, the Fish and Wildlife Service and EPA objected to the project. EPA argued that the project was not "water-dependent," that alternatives were available and that the cumulative impact of numerous small activities such as Mr. Thomas' could de-

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[9] Army Corps File No. NCSCO-RF 80-480-13/VF, 80-302-15, Army Corps of Engineers, St. Paul District Engineer, 1135 U.S. Post Office, St. Paul, Minnesota 55101; Letter to Mr. Vartkes Broussalian from Major David E. Peixotto, Department of the Army (Official Memorandum) (April 1, 1982). (In this memorandum, Major Peixotto validated the facts of the two Section 404 cases contained in the Task Force Report, Appendix A ——, and the case of Mr. Thomas). *See also Appleton: A Regulated City*, The Washington Post, April 7, 1981 at 14.

stroy protected resources. As a result, Mr. Thomas' permit application was denied.

The plight of Arnie Thomas reflects the unreasonableness of establishing a presumption that all wetlands are valuable to the aquatic ecosystem and that, where a project is not water-dependent, alternatives are presumed to exist. The ludicrous and patently unfair results that flow from applying such presumptions in cases such as Mr. Thomas' are illustrative of the types of abuses presently experienced by property owners who find themselves caught up in the Section 404 process. The question one must ask, however, is whether Congress ever intended, when it created the CWA, for the Corps' jurisdiction to extend to the point where such bewildering results would ensue. The answer one finds is no.

II. THE SIXTH CIRCUIT'S DECISION IS FULLY SUPPORTED BY THE CLEAN WATER ACT AND ITS LEGISLATIVE HISTORY

The CWA was created by Congress in order to combat pollution in the "navigable waters" of the United States; it was not designed to operate as a wetlands preservation law. As will be shown below, while the term "navigable waters" was intended to have a more expansive meaning than that which it had traditionally, there is no evidence in the Act's history to indicate that the term was to include all wetlands. Rather, the 1972 legislative history makes it abundantly clear that the Corps' jurisdiction over navigable waters was *only* extended beyond the traditional limits to include those waters which might become navigable after reasonable improvements, and also the tributaries of waters that are navigable in fact.

To the extent Congress envisioned that certain wetlands might require protection in order to preserve the waters specifically identified in the CWA, there certainly was no intention to protect "every brook, creek, cattle

tank, mud puddle, slough, or damp spot in every landowner's backyard across this Nation." 123 Cong. Rec. S26,722 (1977) (floor statement of Senator Tower). The protection, if any, to be extended to a particular wetland was only to be exercised in furtherance of the goals and objectives of the CWA.

A. The Legislative History of the Clean Water Act Demonstrates That It Was Designed To Protect Water Quality and Is Not a Wetlands Preservation Law

The government maintains in its brief that "if the Corps is to fulfill Congress' intent to protect ecologically important wetlands, then its threshold jurisdiction must be construed broadly." Pet. Brief at 14. Not only does the government fail to cite any authority in the history of the 1972 FWPCA amendments to support this finding of "congressional intent," but its position misinterprets the purpose of the CWA and, in particular, Section 404.

The CWA unequivocally states that its objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the primary goals of the CWA is to eliminate by 1985 "the discharge of pollutants into navigable waters." 33 U.S.C. § 1251(a)(1). The Section 404 program was established in order to help attain this goal by authorizing the "Administrator [of EPA] and the Secretary [of the Army] to move expeditiously to end the process of dumping dredged spoil in water—to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States including the Great Lakes." 118 Cong. Rec. H33,699 (1972) (statement of Senator Muskie).

While the legislative history of the FWPCA amendments of 1972 evinces Congress' intent to expand somewhat the traditional view of navigability, the history also indicates that the conferees in no way intended to com-

pletely discard concepts of navigation for purposes of jurisdiction under the Act:

> "It is intended that the term 'navigable waters' include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact . . . [S]uch waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today." *Id.*

This discussion of the term "navigable waters" suggests that, even though Congress wished to broaden the meaning of this term, it still intended for jurisdiction under the CWA to be limited to waters having some linkage to navigability. Although certain wetland areas may have to be regulated in order to protect the quality of these navigable waters, such regulation is permissible since it is tied directly to the goals of the Act and is not done solely to preserve a wetland. That the Corps' jurisdiction was to be limited to waters having some connection to navigability is also evident from a review of the congressional debates on the 1972 FWPCA amendments.

In discussing the new broader definition of "navigable waters," Congressman Dingell, an avid supporter and floor manager of the FWPCA amendments, made the following observation:

> "The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be 'susceptible of being used . . . with reasonable improvement,' as well as those waterways which include sections pres-

ently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera. *United States v. Utah*, 238 U.S. 64 (1931); *United States v. Appalachian Electric Power Co.*, [311] U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA 7, 1945) *cert. den.* 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA 7, 1954) *cert. den.* 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA 7, 1954) . . . ." 118 Cong. Rec. H33,756 (1972).

A review of the cases cited by Congressman Dingell provides plentiful insight into where Congress intended to draw the jurisdictional line under Section 404.

In *United States v. Appalachian Electric Power Company*, 311 U.S. 377 (1940), the Supreme Court had occasion to interpret the following traditional test of navigability set forth in the Daniel Ball case:

> "'. . . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, *or are susceptible of being used*, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.'" *Id.* at 406 n.21, quoting from *Daniel Ball*, 10 Wall. 557, 563 (1870) (emphasis added).

The Court construed the phrase "susceptible of being used, in their ordinary condition" as including those waters which *might be* navigable "after reasonable improvements." *Id.* at 409. The Court also determined that the "constitutional power of the United States over its waters" was not limited solely "to control for navigation" but that "[f]lood protection, [and] watershed development . . . are likewise parts of" the government's control. *Id.* at 426.

The Court thus extended the traditional concept of navigability to those waters which might be susceptible to use for commerce and recognized that Congress' authority was not merely limited to control for navigation.

The authority of Congress to control activities on *non-navigable* tributaries of navigable waters was decided by the Supreme Court in *Oklahoma ex rel. Phillips v. Atkinson Company*, 313 U.S. 508 (1941). In that case, the Court held that "Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions." *Id.* at 523. Furthermore, the Court determined that the power of the government over "flood control," as was recognized in *Appalachian Electric Power Company*, "extends to the tributaries of navigable streams." *Atkinson*, 313 U.S. at 526.

Appalachian Electric Power Company and its progeny are extremely useful in ascertaining Congress' intent with regard to the scope of the term "navigable waters." As indicated by Congressman Dingell, Congress' expanded view of this term was essentially derived from the opinions in these cases. While these opinions may have extended the term "navigable waters" to include waters "susceptible of being used" for navigation as well as tributaries of navigable waters, they did not go so far as to encompass all wetlands. This fact, coupled with the absence of any language regarding wetlands in the 1972 legislative history, suggests rather conclusively that Congress had no intention of including these areas within the Corps' Section 404 jurisdiction.

B. To the Extent the Clean Water Act Encompasses Wetlands, It Certainly Does Not Include All Wetlands

The government's primary support for its position that Congress fully intended to regulate wetlands under the CWA is based upon the 1977 amendments to the Act. Although the 1977 legislative history contains some discussion of wetlands and wetlands values, the term "navigable waters" was not redefined either to include or exclude areas such as wetlands. As a matter of fact, the *only* mention of the term "wetlands" in the final 1977 amendments is in Section 404(g)(1), which merely describes the procedure for state assumption of a dredge and fill program. 33 U.S.C. § 1344(g)(1).

The government also makes reference to statements by Senator Baker and Senator Muskie in support of its view that Congress, in the 1977 amendments, ratified the Corps' regulatory assertion of jurisdiction over all wetlands. There are, however, conflicting statements by both of these Senators in the legislative history which illustrate that there was actually considerable confusion by members of Congress regarding the proper scope of the Corps' jurisdiction. For instance, Senator Baker, in commenting upon the types of waters that are subject to Section 404 jurisdiction, clearly maintained the prerequisite hydrologic connection to traditionally navigable waters:

> "A fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes. Several Federal courts have endorsed the wisdom, and constitutionality, of this committee's observation that:
>
> > 'Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the *navigable waters, portions thereof, and their tributaries.*' . . .

> "Unless Federal jurisdiction is uniformly implemented for all waters, discharges located on nonnavigable tributaries *upstream from the larger rivers and estuaries* would not be required to comply with the same procedural and substantive standards imposed upon their *downstream* competitors." 123 Cong. Rec. S26,718 (1977) (floor statement of Senator Baker) (emphasis added).

Moreover, Senator Muskie, who as the government notes was "one of the primary sponsors of the Act" (Pet. Brief at 26), took it upon himself to express Congress' overall dissatisfaction with the way in which the Corps had proceeded to regulate activities in this country under Section 404:

> "There is not a Senator on the floor, including the Senator who is speaking, who supports Section 404 as it has been interpreted and implemented by the Corps of Engineers.
>
> . . .
>
> "The corps proceeded to take . . . section [404] and, by its interpretation, expand it far beyond any intent of the Congress so that it found itself threatening regulation in areas of the country which the corps had never imagined it had any jurisdiction over." 123 Cong. Rec. S26,728 (1977).

Senator Muskie also rejected any notion that Section 404 was intended to regulate *all* wetlands when, in response to Senator Dole's concern that "any standing water in a field where cattails, or other weeds have grown up around it" would fall within the ambit of Section 404, he stated that such an area would not be covered by Section 404 since the Corps' definition of "wetlands" was intended to describe "only the true swamps and marshes that are part of the aquatic ecosystem." 123 Cong. Rec. S26,767 (1977) (floor discussion between Senator Muskie and Senator Dole).

The government contends that Congress' failure to redefine the term "navigable waters" in the 1977 amend-

ments is tantamount to congressional ratification of the Corps' post-*Callaway* regulations, which extended regulatory jurisdiction over all wetlands, including "nonadjacent" or isolated wetlands. It must be noted, however, that the Corps' regulations concerning the latter type of wetland *were not even in effect* during the House debates on Section 404 in 1977. In addition, the regulations had been in place only briefly during the Senate's discussion of Section 404 amendments and had been operative for only five months prior to Congress' consideration and passage of the final conference report on the 1977 amendments.[10] While legislative silence may in some circumstances be viewed as congressional ratification of an agency's interpretation of a statute, this is only where the administrative interpretation has been "consistent" and "shown clearly to have been brought to the attention of Congress." *Kay v. Federal Communications Commission*, 443 F.2d 638, 646 (D.C. Cir. 1970). In the case at bar, neither of these factors has been satisfied.

While it may be asserted that the Corps must exercise jurisdiction over some critical wetlands to fulfill its legal obligations, the current scope of jurisdiction goes far beyond what has been sanctioned by Congress and the courts.

The 1975 decision of the United States District Court for the District of Columbia in *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, is uniformly cited as supporting expansive Section 404 jurisdiction. *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979); *Avoyelles Sportsmen's League, Inc. v. Marsh*,

[10] *See* 3 Congressional Research Service, Library of Congress, A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act at 49 (1978) (Section 404 amendments were passed by the House on April 5, 1977; by the Senate on Aug. 4, 1977; and both houses agreed to the conference report on Dec. 15, 1977); 33 C.F.R. § 209.120(e)(2)(i) (1976) (regulations became effective July, 1977).

715 F.2d 897 (5th Cir. 1983). In *Callaway*, the court determined that Congress, in the FWPCA of 1972, had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." *Id.* at 686. The traditional tests of navigability were found to be inapplicable to the term "navigable waters" for purposes of the FWPCA. Accordingly, the court determined that the definition of "navigable waters" which had been promulgated by the Corps in its Section 404 regulations and which encompassed only traditionally navigable waters failed to comply with the requirements of the FWPCA. *Id.*

Callaway did not explicitly include wetlands as part of the "nation's waters" to be regulated under Section 404; the court merely found that the Corps had interpreted the term "navigable waters" *too narrowly*. Neither the court's opinion nor the CWA as it existed in 1975 mentioned the term "wetlands," much less included wetlands as "navigable waters" within the ambit of Section 404.[11]

As previously indicated, Congress did not define the term "wetlands" in its amendments to the CWA. This task was therefore left to the agencies charged with administering Section 404. Those agencies must look to the purposes underlying the CWA in promulgating the relevant jurisdictional definitions.[12] The values behind

[11] It must be emphasized that this one-page District Court decision provides no legal analysis or reasoning for its conclusions. To the extent that this case conflicts with this Court's understanding of the CWA and its legislative history, it should be overruled.

[12] The Presidential Task Force Report on Section 404 also recognized that not every wetland was to be included within the Corps' regulatory jurisdiction:

> "While Congress' definition goes beyond the traditional definition of 'navigable waters' covered by earlier Corps regulatory programs, it also does not encompass all biological 'wetlands' however defined or regardless of their connection to waters." Appendix A at A-7.

preserving a particular wetland must be tied to one of the stated goals of the CWA. As noted by Congressman Alexander in commenting upon the House Report to amend FWPCA in 1977:

> "I do not believe the Congress intended for section 404 to cover all of the Nation's waters and wetlands. I believe the intent was to maintain Federal authority over dredging and filling operations in commercially navigable waters." 123 Cong. Rec. H10,418 (1977).

In his article, *The Public Interest Review Process*, Bernard N. Goode, Chief, Regulatory Functions Branch, Office of the Chief of Engineers, United States Army Corps of Engineers, specifically states that Section 404 "was never designed to protect wetlands, but rather to control the discharge of two types of pollutants into the nation's waters—dredged material and fill." 3 Nat'l Wetlands Newsletter 6-7 (Jan.-Feb. 1981).

As is evident from the preceding discussion, Congress in no way intended for Section 404 to reach all wetlands. Rather, the guiding principle for determining whether 404 jurisdiction extends to a particular wetland is whether a hydrologic connection exists between the wetland and any lake, river, stream, or tributary. This guiding principle is in fact equivalent to the Sixth Circuit's interpretation of the Corps' wetland regulation in this case. After reviewing the Corps' amended wetland regulation, and the Corps' interpretive statements pertaining thereto, the lower court construed the regulation as being limited to "lands such as swamps, marshes, and bogs" that have a direct hydrologic connection to "waters from adjacent streams and seas subject to the jurisdiction of the Corps that it is not unreasonable to classify them as lands which frequently underlie the 'waters of the United States.'" *Riverside Bayview*, 729 F.2d at 398, Pet. App. at 15a. The District Court determined that the navigable waters contiguous to the

Riverside property had not contributed to the wetland characteristics of the land, except for the six instances of inundation over an 80-year period. Joint Appendix at 50. Absent the hydrologic connection to those waters, the Sixth Circuit was entirely correct in finding that the Riverside property fell outside the ambit of the Corps' jurisdiction under the CWA and its interpretation of the Corps' wetland regulation is fully consonant with the terms of the CWA and its legislative history.

CONCLUSION

Based upon the arguments presented herein and the reasons set forth in the brief of respondents, Riverside Bayview Homes, Inc., et al., the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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DATED: June, 1985.

APPENDIX

APPENDIX

THE VICE PRESIDENT
OFFICE OF THE PRESS SECRETARY

FOR IMMEDIATE RELEASE
9:00 A.M.
Friday, May 7, 1982

CONTACT: Peter Teeley
Shirley Green
202/456-6772

Time and date are local

Announcement of administrative reforms to the regulatory program under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act

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Christopher C. DeMuth, Executive Director of the Presidential Task Force on Regulatory Relief, today announced the initiation of major administrative reforms of the U.S. Corps of Engineers' permit program. The reforms will dramatically reduce the delays in processing permit applications and, according to rough estimates by the Corps, could save $1 billion annually.

. . . .

The reforms will include: eliminating the multi-level bureaucratic review procedure, expanding the use of general permits, giving states more authority and responsibility for permit decisions, and clarifying the scope of the permit program. This effort to develop a workable and efficient permit program is based on the recommendations of William R. Gianelli, Assistant Secretary of the Army for Civil Works, and senior officials from EPA, the Departments of the Interior and Commerce, and other agencies.

FACT SHEET

The U.S. Army Corps of Engineers
Section 10/404 Regulatory Program

. . . .

- The Army Corps of Engineers administers Section 404 as part of its regulatory permit program, which also includes Section 10 of the Rivers and Harbors Act of 1899 and Section 103 of the Marine Protection, Research and Santuaries [sic] Act. Section 404 expanded the Corps' regulatory program from traditional navigable waters (for which Section 10 permits were also required) to "waters of the United States," which have been construed by some to encompass practically all waters and wetlands.

. . . . .

- The Section 404 program has been plagued by severe delays that have generated complaints and imposed heavy economic burdens on the public. Despite recent improvements, average processing time for "delayed" (processing time greater than 120 days) permit actions was 815 days for applications requiring Environmental Impact Statements (EIS), and 270 days for those not requiring an EIS. Roughly 3 of every 10 permit actions are delayed and 1 percent of those delayed require an EIS. Based upon the number of permit applications experiencing processing time longer than 120 days, the total cost of delays has been estimated on a very rough basis by the Corps to be in excess of $1.5 billion annually.

. . . .

- Two illustrative cases of delays in the Section 404 program are provided at the end of this fact sheet. The first illustrates the kinds of complications that can arise from several layers of reviews involving different agencies. The second illustrates that long delays have occurred even over relatively minor issues.

CASE SUMMARY NO. 1

LAKE ALMA PERMIT

The Lake Alma project was originally part of a Department of Housing and Urban Development grant to construct a public reservoir to help satisfy water-oriented recreation needs of the City of Alma and Bacon County, Georgia, and to stimulate economic growth in the region.

On October 4, 1977, the City of Alma and Bacon County Commissioners applied for an Army Section 404 permit. The application called for the construction of an earthen dam to create a 1,400 acre recreation lake on Hurricane Creek.

EPA and the US Fish and Wildlife Service objected to issuing the permit on the ground that the project did not justify elimination of approximately 1,400 acres of wetlands and that quality of the lake water would be unacceptable for recreational uses. The Georgia Department of Natural Resources supported the project citing the relative low quality of the existing wetlands; the Environmental Protection Division of DNR stated that water quality in the proposed lake would meet or exceed all applicable water quality standards for recreational waters.

The FWS conducted an evaluation of the project and submitted a mitigation plan which included a provision that the applicants purchase and manage additional acreage to offset the loss of wildlife habitat. Following acceptance of the mitigation plan by the applicants, FWS withdrew its objection.

The mitigation plan included a group of six small artificial lakes (green tree reservoirs, comprising a total of 194 acres) to be constructed and managed for wildlife habitat. EPA then added to its objection the concern that the green tree reservoirs would be detrimental to

water quality. EPA continued its objection to the project as it was elevated through the Division Engineer and the Chief of Engineers to the Assistant Secretary of the Army for Civil Works, with each level trying to resolve EPA's concerns. When the ASA(CW) received the report in August 1981, he consulted with EPA and called for a restudy of the green tree reservoirs. Upon completion of the study, the ASA(CW) directed the issuance of the permit. In September 1981 he transmitted his decision to the EPA Administrator who could have, but did not, elevate the matter to the Secretary of the Army.

The permit was finally issued on November 10, 1981, four years after the application.

CASE SUMMARY NO. 2

CAMERON CONSTRUCTION COMPANY

On June 19, 1979 the Cameron Construction Company applied for a Corps permit to convert 10 acres of marsh along a navigation channel to a water oriented commercial use. The proposed project would allow Cameron Construction to expand its operations in Cameron, Louisiana, to meet the increased needs of energy producers. The proposed site is near Cameron Construction's existing facility and would require the placement of fill material over the 10 acres and construction of a 614-foot long bulkhead.

The National Marine Fisheries Service, part of the Department of Commerce, objected to the permit on the grounds that the project would have significant adverse consequences on important marine resources and that there were other viable alternatives. The Corps of Engineers disagreed with NMFS and proposed to issue the permit. Subsequently, in accordance with the 404(q) Memorandum of Agreement, NMFS elevated the issue to the Division Engineer and then to the Chief of Engineers. At each level, the Corps weighed all factors, including the concerns of NMFS, and found that the public interest was best served by issuing the permit.

On February 2, 1981, the matter was elevated to the Assistant Secretary of the Army for Civil Works. After evaluating all aspects of the issue, the ASA(CW) found that, although the 10 acres of wetlands would be lost, this only represented five ten-thousandths of one percent of the total wetlands in the area and that the benefits to be gained from the project were considerable. Further, he found that the Corps had adequately evaluated eight alternatives to the proposed action and had found that

none of them offered significant advantages over the proposal.

In April 1981, the ASA(CW) decided that it was in the public interest to issue the permit and directed the Corps of Engineers to do so. The permit was issued on June 20, 1981, two years after the application.

ADMINISTRATIVE REFORMS TO THE REGULATORY PROGRAM UNDER SECTION 404 OF THE CLEAN WATER ACT AND SECTION 10 OF THE RIVERS AND HARBORS ACT

. . . .

V. *Clarifying the Scope of the Permit Program*

The Section 404 program has been plagued by uncertainties over its jurisdictional scope. Individuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required, and have sometimes been required to obtain permits or modify projects after they had begun or completed them.

The Administration is strongly committed to protecting the nation's important wetlands. However, a proper regard for Congressional intent and sound administrative practice requires recognition that the purpose of Section 404 is not to restrict development of certain types of land as such, but rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While Congress' definition goes beyond the traditional definition of "navigable waters" covered by earlier Corps regulatory programs, it also does not encompass all biological "wetlands" however defined or regardless of their connection to waters.

The current administrative definitions of the jurisdiction of the Section 404 program, contained in regulations of the EPA and the Corps, need to be clarified to provide better guidance to private parties and the Corps' own District Engineers. EPA and the Army, in consultation with other expert agencies, will develop new and more specific criteria redefining the scope of the program, based upon technical parameters and specifying which types of wetlands are and are not appropriately covered by the Clean Water Act. The purpose of the new criteria will

be to introduce a reasonable degree of certainty into the scope of the Section 404 regulatory program and to maintain essential protection of the chemical, physical, and biological integrity of the Nation's waters.

* * * *